Prime Laboratories, Inc. *and* Local 42-S, Production, Service and Sales District Council, H.E.R.E., AFL–CIO CLC. Case 29–CA–16306

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On June 29, 1993, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions to the judge's decision and the General Counsel filed a letter in lieu of a brief answering the Respondent's exceptions and supporting the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Prime Laboratories, Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to the judge's exclusion of testimony regarding prehearing settlement discussions between the Respondent and counsel for the General Counsel. The Respondent contends that this denial precluded the Respondent from producing evidence that its reinstatement offer to Campbell was given in good faith. We agree with the judge's exclusion because prehearing settlement discussions are not usually regarded as admissible record evidence. Further, we note that the Respondent did not make an offer of proof of its intended testimony nor pursuant to Sec. 102.118(a)(1) of the Board's Rules and Regulations, did it make a written request to the General Counsel either to appeal the judge's ruling or to request testimony by counsel for the General Counsel regarding the prehearing settlement discussions. Therefore, we find the Respondent's exception lacking in merit.

[2] With respect to the reinstatement issue on which the Respondent excepts, we note that the record incontrovertibly establishes that Campbell read the mailgram containing an alleged offer of reinstatement on January 31 rather January 30, 1993, as erroneously stated by the judge.

No exceptions were taken with respect to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Griffith Campbell, and threatening to move its facility and by telling Campbell that the employees should abandon their support for the Union, and that the Respondent violated Sec. 8(a)(3) of the Act by discharging employee Campbell because he supported the Union.

Sharon Chan, Esq., for the General Counsel.
Stuart Bochner, Esq. (Horowitz & Pollack, P.C.), of South Orange, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Prime Laboratories, Inc. (the Respondent) discharged one of its employees and engaged in other conduct in order to discourage its employees from supporting Local 42-S, Production, Service and Sales District Council, H.E.R.E., AFL–CIO CLC (the Union). The Respondent is alleged to have violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

I heard this case in Brooklyn, New York, on March 4, 1993. On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing memorandum submitted by counsel for the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

The Respondent makes cosmetic and hygiene products at its plant in Long Island City, New York. In its operations annually, it meets the Board's nonretail standard for the assertion of jurisdiction.

The Respondent's answer admits that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The following is based on the uncontroverted testimony of Nelson Rivera and Griffin Campbell.

In January 1992, Rivera, a business representative of the Union, waited outside the Respondent's plant to talk with the Respondent's employees when they came out. Campbell was one of the employees who talked with Rivera then. They discussed the Union's attempt to organize the employees. A week later, they had another such discussion shortly after 5 p.m. On the following morning, the Respondent's president, Phillip Ort, asked Campbell if he had talked with ''a union guy'' the previous evening. When Campbell did not respond directly, Ort told him that he would move his plant to New Jersey if a union comes into it.

On January 27, 1992, Ort asked Campbell why the employees needed a union. When Campbell replied by asking what was wrong with a union, Ort insisted that he answer his question. Campbell told him that a union ''stands between you and me so that each of us would get our justice.'' Ort told Campbell that the employees should ''drop the Union.'' When Campbell said that he could not do that, Ort said that Campbell was a dissatisfied employee who had lied to him. Ort directed him to punch out his timecard, after having told him that he cannot have a dissatisfied employee working for him. Campbell punched his card and left.

Several days later, Ort, via a law firm, sent a mailgram to Campbell informing him that he was reinstated in full to his job and to report for work on February 3. The mailgram further stated that Campbell should call Ort ''to discuss the situation'' if the date is not convenient. Campbell read the mailgram on January 30. On February 3 Rivera called Campbell. Campbell told him of the mailgram. On February 6, Campbell accompanied Rivera to the Board's Regional Office where Campbell gave an affidavit to support the unfair

labor practice charge the Union had filed in this case. Later on February 6, Campbell telephoned Ort and told him that he was calling in reference to the mailgram. Ort said that he had a customer there and that he could not talk to Campbell. He asked Campbell to call back at 3 p.m. When Campbell called back at 3 p.m., the receptionist told him that Ort was not there. Campbell told her that Ort can call him at his telephone number which was listed in the Respondent's records. Ort never returned the call.

The uncontroverted evidence in this case establishes that the Respondent, by its president, coercively interrogated Campbell as to his activities in support of the Union. See *Ernst Home Centers*, 308 NLRB 848 (1992). Ort's threat to relocate the plant and his telling Campbell, in effect, that the employees should abandon their support for the Union also were statements coercive of employee rights under Section 7 of the Act. See *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992). The evidence also establishes conclusively that the Respondent discharged Campbell on January 27, 1992, because he supported the Union. In so doing the Respondent unlawfully sought to discourage its employees from supporting the Union. See *Pincus Elevator*, supra.

Respecting the mailgram sent Campbell after his discharge, I find that Campbell responded to it within a reasonable period of time. I further find, based on the events of February 6 and Ort's failure to respond to Campbell's call of that date, that the mailgram offer was not made in good faith. Cf. *Esterline Electronic Corp.*, 290 NLRB 834 (1988). I thus conclude that the Respondent's purported offer to reinstate Campbell was invalid.

CONCLUSIONS OF LAW

1. The Respondent is an employer as defined in Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having coercively interrogated an employee as to the support the Union may have among its employees, by having threatened to move its plant from New York City to New Jersey to discourage its employees from supporting the Union, by telling them to abandon their support of the Union, and by the conduct described below in paragraph 4.

4. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) of the Act by having discharged its employee, Griffin Campbell, in order to discourage support among its employees for the Union.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order it to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, the Respondent shall be directed to offer Griffin Campbell immediate and full reinstatement to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed. Further, the Respondent shall be ordered to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent also shall be ordered to remove from his file any reference to his unlawful discharge and notify him that this has been done and that any such documents will in no way be used against him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Prime Laboratories, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees as to their activities in support of Local 42-S, Production, Service and Sales District Council H.E.R.E., AFL–CIO CLC (the Union).

(b) Threatening to move its plant to discourage support among its employees for the Union.

(c) Instructing its employees to abandon their support for the Union.

(d) Discharging any of its employees for supporting the Union.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Griffin Campbell immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent one, without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole, with interest, for any loss of earnings and benefits he suffered as a result of his unlawful discharge in the manner set forth in the remedy section of this decision.

(b) Remove from its files all references to his unlawful discharge and notify him in writing that this has been done and that his discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Long Island City, New York copies of the attached notice marked ''Appendix.''[2] Copies of

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT ask you about your support of the Union, Local 42-S, Production, Service and Sales District Council, H.E.R.E., AFL–CIO CLC.

WE WILL NOT threaten to move our plant in order to discourage you from joining the Union.

WE WILL NOT tell any of you to abandon your support of the Union.

WE WILL NOT discharge any of our employees to discourage membership in the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights under Section 7 of the Act.

WE WILL offer Griffin Campbell his job back and pay him, with interest, for all the wages and benefits he lost because we discharged him in order to discourage membership in the Union.

WE WILL remove all references in our files as to his unlawful discharge and WE WILL notify him that we have done this and that his discharge will not be used against him in any way.

PRIME LABORATORIES, INC.